No. 12236

IN THE UNITED STATES

Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

CHRYSLER CORPORATION PARTS WHOLESALERS NORTHWEST REGION, MoPAR CLUB, S. L. SAVIDGE, INC., AMERICAN AUTOMOBILE COMPANY, COMMERCIAL AUTOMOTIVE SERVICE, INC., WINTHROP MOTOR COMPANY, RIEGEL BROTHERS, INC., W. G. POWELL, JOHN MUNSTER, STANLEY SAYRES, RALPH W. HANSON, FRANK L. HAWKINS, CARL J. BRUSH, GEORGE W. MILLER, STANLEY PETERSON, DEE R. RIEGEL, and T. H. NAISMITH,

Appellees.

BRIEF OF APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE SAM M. DRIVER, *Judge*

Office and Post Office Address:

603 Central Building
Seattle 4, Washington

BOGLE, BOGLE & GATES
Robert W. Graham
J. Tyler Hull
Attorneys for Appellees Commercial Automotive Service, Inc., Frank L. Hawkins and Carl J. Brush

918 Joseph Vance Building
Seattle 1, Washington

EGGERMAN, ROSLING & WILLIAMS
Edward L. Rosling
Robert G. Moch
Attorneys for Appellees S. L. Savidge, Inc., W. G. Powell and John Munster

Puget Sound Bank Building
Tacoma, Washington

EISENHOWER, HUNTER & RAMSDELL
James V. Ramsdell
Attorneys for Winthrop Motor Company, George W. Miller and Stanley Peterson

1012 Northern Life Tower
Seattle, Washington

FERGUSON, BURDELL & ARMSTRONG
Charles S. Burdell
Attorneys for Appellees Chrysler Corporation Parts Wholesalers Northwest Region and MoPar Club

Paulsen Building
Spokane, Washington

RANDALL & DANSKIN
C. D. Randall
Attorneys for Appellees Riegel Brothers, Inc., Dee R. Riegel and T. H. Naismith

1107 American Building
Seattle, Washington

TRACY GRIFFIN & KENNETH SHORT
Attorneys for Appellees American Automobile Company, Stanley Sayres and Ralph W. Hanson

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Appellees.

BRIEF OF APPELLEES

JURISDICTIONAL STATEMENT

Appellees concur in the statement of the appellant that the indictment considered by the court below purports to charge a violation of Section 1 of the Sherman Act (15 U.S.C.A. § 1); that jurisdiction of the District Court was based upon 18 U.S.C.A. § 3231 and that this Court has jurisdiction of this appeal in accordance with the provisions of 18 U.S.C.A. § 3731.

STATUTE INVOLVED

Appellees concur in the statement that Section 1 of the Sherman Act (15 U.S.C.A. § 1) is involved in this appeal.

STATEMENT OF THE CASE

The indictment which was dismissed by the court below purports to charge two unincorporated associations, five corporations and ten individuals with violating Section 1 of the Sherman Act, it being alleged that the unincorporated

associations are composed of and the individuals are officers of the five Washington corporations which are *wholesalers* authorized to sell Chrysler replacement parts and engines at wholesale and at retail (R. 3-5). Neither the Chrysler Corporation nor any of its officers, agents or employees nor any one else outside the State of Washington are parties to the conspiracy alleged and the only relationship of Chrysler Corporation to any of the defendants or their activities is that of vendor, it being specifically alleged that the defendants are not "agents acting for Chrysler in the distribution of replacement parts and engines." (R. 7.)

It is alleged that Chrysler replacement parts and engines are manufactured outside the State of Washington and that the Chrysler Corporation *"sells* Chrysler replacement parts and engines to * * * 'authorized Chrysler dealers,' to whom it has granted a franchise to sell said automobiles and trucks and to a limited number of * * * persons and concerns, hereinafter referred to as 'authorized Chrysler wholesalers' who because of their geographical location, size and facilities for wholesale distribution of parts and engines, are granted franchises to act as wholesalers as well as retailers." (R. 6-7). The corporate defendants are stated to be the authorized Chrysler wholesalers in the state of Washington who sell to various classes of customers and it is stated that they sell more than 90% of the Chrysler replacement parts and engines used in the state of Washington (R. 7-8).

It is alleged that the defendants by conspiracy fixed the prices and discounts at which Chrysler replacement parts and engines were to be sold by the corporate defendants within the state of Washington (R. 9-15). All sales by the defendant corporations are stated to be within the state of Washington and it is nowhere alleged that the defendants

have made sales outside the state of Washington (R. 8, 9, 11, 12, 13 and 14).

The purpose, intent and necessary effect of the alleged conspiracy is stated to be (R. 14):

> "(a) To eliminate all price competition among defendants and the authorized Chrysler dealers to whom they sell, in the sale of Chrysler replacement parts and engines shipped in interstate commerce into the state of Washington and sold and distributed therein, and to deny the consuming public in the state of Washington the benefits of such competition.
>
> "(b) To raise, fix and maintain the prices at which Chrysler replacement parts and engines shipped into the state of Washington in interstate commerce are sold in the state of Washington, * * *"

It is alleged in paragraphs 8 and 9 of the indictment (R. 7-8):

> "8. Authorized Chrysler wholesalers are not mere agents acting for Chrysler in the distribution of replacement parts and engines. By the terms of their franchise contracts with Chrysler, they are independent entrepreneurs engaged in the business of purchasing said parts and engines from Chrysler and reselling them as their own property. Said authorized Chrysler wholesalers sell said parts and engines to five classes of customers:
>
> "(a) Authorized Chrysler dealers;
>
> "(b) Owners of independent garages, repair shops, body rebuild shops and service stations who sell or install replacement parts or engines;
>
> "(c) Fleet customers, such as cab companies, truck lines and other concerns using a number of vehicles in connection with their business;

"(d) Over-the-counter customers, not falling within any of the three previous categories, who purchase replacement parts or engines at retail; and

"(e) Repair department customers who have replacement parts or engines installed in their vehicles in the course of repairs made by the service departments of corporate defendants.

"9. Authorized Chrysler dealers are likewise independent enterpreneurs engaged in the business of purchasing and reselling Chrysler replacement parts and engines. They purchase substantially all of their requirements of said parts and engines from authorized Chrysler wholesalers, and resell said engines and parts to the classes of customers described in subparagraphs 8(b), (c), (d), and (e) above, in competition with authorized Chrysler wholesalers doing business in the same area."

The following passages from paragraphs 10, 11 and 21 of the indictment (R. 8, 9 and 14-15) are the sole and only statements in the indictment by which it is attempted to relate the alleged conspiracy to interstate commerce and by which the appellant seeks to invoke the applicability of Section 1 of the Sherman Act:

"10. * * * in anticipation of, and in response to, orders and demands from customers in the state of Washington of the classes described in paragraph 8 hereof, the corporate defendants regularly order, purchase and procure the shipment of Chrysler replacement parts and engines from the Chrysler plants located in the states listed in paragraph 6 hereof, and resell said parts and engines to said customers in the state of Washington. Said corporate defendants, and authorized Chrysler dealers in the state of Washington to whom they sell, serve as a conduit through which said Chrysler replacement parts and engines move in a regular, continuous

and uninterrupted flow to the ultimate users of said parts and engines in the state of Washington.

* * *

"11. * * * The purchase and resale of Chrysler replacement parts and engines by the corporate defendants as the authorized Chrysler wholesalers for the state of Washington, and by the authorized Chrysler dealers to whom they sell, is an integral part of and incidental to the uninterrupted movement of said substantial volume of Chrysler replacement parts and engines in interstate commerce from the Chrysler plants located in the states listed in paragraph 6 hereof, to the ultimate users of said replacement parts and engines in the state of Washington.

* * *

"21. The purpose, intent and necessary effect of the aforesaid combination and conspiracy has been and is:

* * *

"(c) To directly, substantially, and unreasonably burden and restrain the flow in interstate trade and commerce of Chrysler replacement parts and engines from the states of Michigan, Georgia, Kansas, Delaware and California to the state of Washington, by means of the aforesaid elimination of price competition, and the aforesaid enhancement, fixing and maintenance of prices."

Upon motions of defendants that the indictment did not allege facts constituting an offense under Section 1 of the Sherman Act and did not allege facts sufficient to establish that the defendants had entered into a conspiracy in restraint of trade or commerce among the several states (R. 17) the Court below ordered the indictment dismissed (R. 24) and certified that this judgment was based in part upon the insufficiency of the indictment as a pleading (R. 26). The

appellant has appealed from this judgment dismissing the indictment (R. 27).

QUESTION PRESENTED

It is the position of the appellees that a single question is involved in this appeal—do the allegations of the indictment above set forth allege a conspiracy which is "in restraint of trade or commerce among the several states" within the scope of Section 1 of the Sherman Act? In short, is a restraint of interstate commerce alleged?

POSITION OF THE GOVERNMENT

The position of the government as set forth in the indictment here under consideration stands upon the bald proposition that an alleged agreement in restraint of trade, i.e., a price fixing agreement, among sellers of products whose entire sales are made wholly within a single state is, *without more*, a violation of the Sherman Act solely and simply because a portion of the products sold by these sellers was at some undetermined time in advance of the sale purchased by the sellers from outside the state.

The heart of the appellant's position is stated in its brief as follows (Brief for Appellant, p. 15):

> "Thus, the question here presented is, at bottom, not merely the construction of a statute but whether, acting to the extent of its constitutional power, the Federal Government can reach a conspiracy to fix prices to consumers of goods which are produced outside of the state and shipped to the conspirators in the state."

Appellees submit that the indictment herein stands without the aid of judicial precedent and if it is to be sustained the proposition must be accepted that the Sherman Act extends to intrastate price fixing conspiracies among local in-

dependent entrepreneurs where any portion of their purchases for resale comes from outside the state—i.e., that the Sherman Act applies to a price fixing conspiracy involving any local retailer or wholesaler in America without the establishment of any further relation to interstate commerce than that such retailer or wholesaler purchased goods from outside his state for resale therein. This we believe for the reasons hereinafter set forth is not the law.

UNDISPUTED PROPOSITIONS

In order that the issue for decision may be more sharply focused we believe that it may be of assistance to indicate those propositions of law adverted to by appellant with reference to which the appellees are not in disagreement.

(1) A conspiracy to fix prices is an unreasonable restraint of trade *per se. United States v. Trenton Potteries Co.,* 273 U. S. 392, 71 L. ed. 700; *United States v. Socony-Vacuum Co.,* 310 U. S. 150, 84 L. ed. 1129. (See Brief for Appellant, p. 13).

Appellees agree that the conspiracy alleged is *of the character* condemned by the Sherman Act *if* it be "in restraint of trade or commerce among the several States." 15 U.S.C.A. § 1.

(2) The scope of the Sherman Act is that of the commerce clause itself. *United States v. Frankfort Distilleries,* 324 U. S. 293, 298, 89 L. ed. 951, 956; *United States v. Southeastern Underwriters Association,* 322 U. S. 533, 558, 559, 88 L. ed. 1440, 1460. (See Brief for Appellant, p. 15).

It is the belief of the appellees and of the court below that the indictment here in question does not allege a set of facts subject to the exercise of the federal commerce power but there is alleged solely and simply a factual situation

which the decisions of the United States Supreme Court in determining the balance within our federal system have placed within the exclusive control of the several states. (See infra, pp 45-47).

Appellees contend that this indictment does not set forth *facts* from which this Court can find that a violation of the Sherman Act has been alleged.

(3) The Sherman Act is broad enough to include both restraints "in" interstate commerce and restraints "affecting" interstate commerce. (Brief for Appellant, p. 16).

ARGUMENT

Summary of Appellees Argument

The indictment involved in this appeal does not allege facts establishing a restraint "in" interstate commerce. Intrastate sales made by local wholesalers or retailers are not "in" interstate commerce, such commerce having ended upon the delivery to the local wholesaler of goods which he may have purchased outside the state.

Nor does the indictment allege any facts showing that the restraint alleged had any substantial effect upon interstate commerce. The indictment does not set forth any facts establishing that the restraint alleged was directed against or involved in any manner persons or activities outside the State of Washington and allegations of mere conclusions are insufficient to establish any such effect. Furthermore sound policy does not justify the extension of the Sherman Act sought by this indictment.

I. The Indictment Does Not Allege a Restraint "In" Interstate Commerce.

Whether or not the concepts of restraints "in" or "af-

fecting" interstate commerce have any functional validity we need not pause to consider (compare *Wickard v. Filburn*, 317 U. S. 111, 120, 87 L. ed. 122, 132). They do serve, however, as a convenient aid in analyzing the decisions of the United States Supreme Court as to the application of the Sherman Act to given factual situations and find expression in its opinions.

The traditional inquiry in determining whether or not given activities are "in" interstate commerce is the inquiry as to whether or not the goods involved have "come to rest" within the state prior to the occurrence of the activity in question. See *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 87 L. ed. 460; *Higgins v. Carr Brothers Co.*, 317 U. S. 572, 87 L. ed. 468; *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 79 L. ed. 1570; *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 275 U. S. 257, 72 L. ed. 270. And this is equally true whether the object of the inquiry be to determine whether or not there is interstate commerce involved for purposes of the Sherman Anti-Trust Act, see *Brosious v. Pepsi-Cola Co.*, 155 F. (2d) 99 (C.C.A. 3, 1946); *Ewing-Von Allmen Dairy Co. v. C. & C. Ice Cream Co.*, 109 F. (2d) 898 (C.C.A. 6, 1940), cert. denied 312 U. S. 689, 85 L. ed. 1126; *United States v. San Francisco Electrical Contractors*, 57 F. Supp. 57 (N. D. Calif. 1944); *C. S. Smith Metropolitan Market v. Food & Grocery Bureau of Southern California*, 33 F. Supp. 539 (S. D. Calif. 1939); the Clayton Act, see *Lipson v. Socony Vacuum Corp.*, 87 F. (2d) 265 (C.C.A. 1, 1937); the Food and Drug Act, see *United States v. Phelps Dodge Mercantile Co.*, 157 F. (2d) 453 (C.C.A. 9, 1946), cert. denied 330 U. S. 818, 91 L. ed. 1270; the Lanham Trade Mark Act, see *C. B. Shane Corp. v. Peter Pan Style Shop*, 84 F. Supp. 86 (N. D. Ill. 1949); the Motor Carrier Act, see *Safety of Operations of Private Property Carriers, Ex Parte* 3, 23 Motor Carrier Cases 1, 39; the

Fair Labor Standards Act, see *Walling v. Jacksonville Paper Co.,* 317 U. S. 564, 87 L. ed. 460; *Higgins v. Carr Brothers Co.,* 317 U. S. 572, 87 L. ed. 468; *Jax Beer Co. v. Redfern,* 124 F. (2d) 172 (C.C.A. 5, 1941); or for any other assertion of the federal commerce power involving the impact of that power upon activities "in" interstate commerce or "in the stream" of interstate commerce.

And while "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business," (*Swift & Co. v. United States,* 196 U. S. 375, 398, 49 L. ed. 518, 525) the decided cases unequivocally establish that *without additional facts being shown* the sales by a wholesaler within a given state of merchandise purchased by the wholesaler from outside the state are not "sufficient to establish that practical continuity in transit necessary to keep a movement of goods 'in commerce'." *Higgins v. Carr Brothers Co.,* 317 U. S. 572, 87 L. ed. 468. To the same effect see *Jax Beer Co. v. Redfern,* 124 F. (2d) 172 (C.C.A. 5, 1941) (Fair Labor Standards Act); *Jewell Tea Co. v. Williams,* 118 F. (2d) 202 (C.C.A. 10, 1941) (Fair Labor Standards Act); *Kantar v. Garchell,* 150 F. (2d) 47 (C.C.A. 8, 1945) (Fair Labor Standards Act); *Brosious v. Pepsi-Cola Co.,* 155 F. (2d) 99 (C.C.A. 3, 1946) (Sherman Act); *Ewing-Von Allmen Dairy Co., Inc., v. C. & C. Ice Cream Co.,* 109 F. (2d) 898 (C.C.A. 6, 1940) (Sherman Act); *United States v. San Francisco Electrical Contractors,* 57 F. Supp. 57 (N.D. Calif. 1944) (Sherman Act); *C. S. Smith Metropolitan Market v. Food & Grocery Bureau of Southern California,* 33 F. Supp. 539 (S.D. Calif. 1949) (Sherman Act).

The government in its brief before the court below contended that interstate commerce "begins with the manufacture of replacement parts and engines by Chrysler Corporation in plants outside the state of Washington and does

not end until these parts are purchased by the ultimate consumer for installation in his car or truck. At all points along their course from manufacturer to consumer the parts and engines are intended for but one end—installation in Chrysler-built vehicles" (which contentions we submit could be made with equal plausibility regarding any consumer product manufactured in America and distributed outside its state of manufacture whether it be shoes, men's suits or chewing gum). Likewise, has the appellant urged as it did below that

> "Any attempt to separate the sale of parts and engines at wholesale or retail from the entire chain of commerce from Chrysler Corporation plants in other states to retail outlets and to consumers in the State of Washington would be patently artificial and unrealistic." (Brief for Appellant, p. 19)

The plain import of these statements is that counsel for appellant either wittingly or unwittingly is asking this Court to abrogate the distinction between interstate and intrastate commence. These contentions of the government might be paraphrased in the language of the shoe industry or any one of a multitude of food or clothing or other items that such interstate commerce "begins with the manufacture of shoes in plants outside the State of Washington and does not end until these shoes are purchased by the ultimate consumer to wear on his feet or for those of his family. At all points along their course from manufacturer to consumer the shoes are intended for but one end—being worn on the feet of the ultimate purchaser." It could also as plausibly be said that "any attempt to separate the sale of shoes at wholesale or retail from the entire chain of commerce from the shoe manufacturer's plants in other states to retail outlets and to consumers in the State of Washington would be patently artificial and unrealistic."

The Supreme Court has not seen fit to adopt any such concept of constitutional doctrine that would destroy the very roots of our constitutional federalism and we note that the appellant, although spelling out more specifically such a theory of interstate commerce in its brief before the court below is content merely that such a theory be inferred from its brief on this appeal.

As indicated above, the decided cases unequivocally establish that *without additional facts being shown* sales by a wholesaler of goods purchased outside the state are not in commerce. The additional facts necessary to "establish that practical continuity in transit necessary to keep a movement of goods 'in commerce' " are enunciated in *Walling v. Jacksonville Paper Co.,* infra pp. 13-19, and we submit that this indictment cannot be sustained as charging a restraint "in" interstate commerce unless its allegations of fact can be found to fall within the rule of the *Jacksonville Paper Co.* decision —a finding which the court below refused to make.

A. The Jacksonville Case.

Walling v. Jacksonville Paper Co., 317 U. S. 564, 87 L. ed. 460, has rightfully become the leading and controlling case in determining whether or not the activities of wholesalers can be said to be "in" interstate commerce since the Fair Labor Standards Act could be applied only insofar as the activities of the respondent wholesaler's employees were "in" commerce. See also *Higgins v. Carr Brothers Co.,* 317 U. S. 572, 574, 87 L. ed. 468, 471. The controlling facts were outlined by Justice Douglas as follows (317 U. S. at 565-566, 87 L. ed. at 465):

> "* * * The sole issue here is whether the Act applies to employees at the seven other branch houses which, though constantly receiving merchandise on interstate shipments and distributing it to their customers, do not ship or deliver any of it across state lines.

"Some of this merchandise is shipped direct from the mills to respondent's customers. Some of it is purchased on special orders from customers, consigned to the branches, taken from the steamship or railroad terminal to the branches for checking, and then taken to the customer's place of business. The bulk of the merchandise, however, passes through the branch warehouses before delivery to customers. There is evidence that the customers constitute a fairly stable group and that their orders are recurrent as to the kind and amount of merchandise. Some of the items carried in stock are ordered only in anticipation of the needs of a particular customer as determined by a contract or understanding with respondent. Frequently orders for stock items whose supply is exhausted are received. Respondent orders the merchandise and delivers it to the customer as soon as possible. Apparently many of these orders are treated as deliveries from stock in trade. Not all items listed in respondent's catalogue are carried in stock but are stocked at the mill. Orders for these are filled by respondent from the manufacturer or supplier. There is also some evidence to the general effect that the branch manager before placing his orders for stock items has a fair idea when and to whom the merchandise will be sold and is able to estimate with considerable precision the immediate needs of his customers even where they do not have contracts calling for future deliveries."

Upon the general rule that intrastate sales by wholesalers are not "in" interstate commerce, the Court engrafted two exceptions. First, it was held that a "temporary pause in transit" at the respondent's warehouse did not necessarily terminate the interstate journey of the goods in question, the Court stating (317 U. S. at 567, 87 L. ed. at 465-466):

"The Administrator contends in the first place that under the decision below any pause at the warehouse is sufficient to deprive the remainder of the journey of its interstate status. In that connection it is pointed out

that prior to this litigation respondent's trucks would pick up at the terminals of the interstate carriers goods destined to specific customers, return to the warehouse for checking and proceed immediately to the customer's place of business without unloading. That practice was changed. The goods were unloaded from the trucks, brought into the warehouse, checked, reloaded, and sent on to the customer during the same day or as early as convenient. The opinion of the Circuit Court of Appeals is susceptible of the interpretation that such a pause at the warehouses is sufficient to make the Act inapplicable to the subsequent movement of the goods to their intended destination. We believe, however, that the adoption of that view would result in too narrow a construction of the Act. It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce."

Secondly, it was held that intrastate deliveries of goods by the respondent "to meet the needs of specified customers" where the goods "are ordered pursuant to a pre-existing contract or understanding with the customer" are "in" interstate commerce as well as "special orders" which are shipped directly from the out of state manufacturer to customers of the wholesaler. The Court stated (317 U. S. at 568, 87 L. ed. 466):

"* * * the Administrator contends that the decision below excludes from the category of goods 'in commerce' certain types of transactions which are substantially of the same character as the prior orders which were included. Thus it is shown that there is a variety of items printed at the mill with the name of the customer. It is also established that there are deliveries of certain goods which are obtained from the manufacturer or supplier to meet the needs of specified customers. Among the latter are certain types of newsprint, paper, ice cream cups, and cottage cheese containers. The record reveals,

however, that the goods in both of these two categories are ordered pursuant to a pre-existing contract or understanding with the customer. It is not clear whether the decision of the Circuit Court of Appeals includes these two types of transactions in the group of prior orders which it held were covered by the Act .We think they must be included. Certainly they cannot be distinguished from the special orders which respondent receives from its customers. Here also, a break in their physical continuity of transit is not controlling. If there is a practical continuity of movement from the manufacturers or suppliers without the state, through respondent's warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse. * * *"

Further than this the unanimous opinion of the Court refused to go in the following language (317 U. S. at 569-570, 87 L. ed. at 467):

"Finally, the Administrator contends that most of the customers form a fairly stable group, that their orders are recurrent as to the kind and amount of merchandise, and that the manager can estimate with considerable precision the needs of his trade. It is therefore urged that the business with these customers is 'in commerce' within the meaning of the Act. Some of the instances to which we are referred are situations which we have discussed in connection with goods delivered pursuant to a prior order, contract, or understanding. For the reasons stated they must be included in the group of transactions held to be 'in commerce.' As to the balance, we do not think the Administrator has sustained the burden which is on a petitioner of establishing error in a judgment which we are asked to set aside. We do not mean to imply that a wholesaler's course of business based on anticipation of needs of specific customers, rather than on prior orders or contracts, might not at times be sufficient to establish that practical continuity in transit

necessary to keep a movement of goods 'in commerce' within the meaning of the Act. It was said in Swift & Co. v. United States, 196 U. S. 375, 398, 49 L. ed. 518, 525, 25 S. Ct. 276, that 'commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.' While that observation was made apropos of the constitutional scope of the commerce power, it is equally apt as a starting point for inquiry whether a particular business is 'in commerce' within the meaning of this Act. We do not believe, however, that on this phase of the case such a course of business is revealed by this record. *The evidence said to support it is of a wholly general character and lacks that particularity necessary to show that the goods in question were different from goods acquired and held by a local merchant for local disposition.*" (Italics supplied).

The appellant rests its contention as to the applicability of the *Jacksonville Paper Co.* case upon the allegations of fact contained in the following single sentence contained in paragraph 10 of the indictment where it is said (R. 8):

> "In anticipation of, and in response to, orders and demands from customers in the State of Washington of the classes described in paragraph 8 hereof, the corporate defendants regularly order, purchase and procure the shipment of Chrysler replacement parts and engines from the Chrysler plants located in the states listed in paragraph 6 hereof, and resell said parts and engines to said customers in the state of Washington."

The following conclusions are also alleged in paragraphs 10 and 11 of the indictment (R. 8, 9) with reference to which conclusions we refer the Court to that portion of our brief hereinafter following at pp. 33-36.

> "* * * Said corporate defendants, and authorized Chrysler dealers in the state of Washington to whom

they sell, serve as a conduit through which said Chrysler replacement parts and engines move in a regular, continuous and uninterrupted flow to the ultimate users of said parts and engines in the state of Washington.

* * *

"* * * The purchase and resale of Chrysler replacement parts and engines by the corporate defendants as the authorized Chrysler wholesalers for the state of Washington, and by the authorized Chrysler dealers to whom they sell, is an integral part of and incidental to the uninterrupted movement of said substantial volume of Chrysler replacement parts and engines in interstate commerce from the Chrysler plants located in the states listed in paragraph 6 hereof, to the ultimate users of said replacement parts and engines in the state of Washington."

The appellant in its brief before this Court has no less than a half dozen times charged the appellees with ignoring "the realities of our integrated national economy." (Brief for Appellant, pp. 9-10, 11, 14, 17, 19 and 31). With all due respect we suggest that the appellant in its brief has ignored the realities of the allegations which are contained in the indictment here under consideration. We believe it is obvious that the appellant has seen the difficulties of its position under the rules announced in the *Jacksonville Paper Co.* case and rather than rely upon the allegations of the indictment itself, appellant has predicated its argument upon what appellant might wish the indictment alleged. Appellant states in its Summary of the Indictment (Brief for Appellant, pp. 3-4):

"* * * It is alleged in paragraph 10 that the corporate defendants regularly order, purchase and procure the shipment of Chrysler replacement parts and engines from Chrysler plants in other states for the purpose of filling two distinct needs.

> "First, drawing upon past sales experience, these companies anticipate probable sales in the immediate future and have parts and engines regularly coming in from out-of-state plants so as to meet dealer and consumer needs as they arise.
>
> "Second, in response to orders already on hand from dealers and consumers, defendant corporations procure shipments from Chrysler plants outside the state of parts or engines, which are intended exclusively for specific dealers or consumers, and are delivered to them upon arrival at defendants' places of business."

See also Brief for Appellants, p. 16. We submit that a reading of the indictment does not disclose what appellant says it does (Supra, p. 4, R. 8, 9).

It was urged in the *Jacksonville Paper Co.* case that sales by the wholesaler were "in" interstate commerce because he could estimate with considerable precision and could anticipate the needs of his customers. Justice Douglas described the evidence there said to support such contention in language which could hardly be a more accurate characterization of the allegations of paragraph 10 of this indictment when he wrote that it "is of a wholly general character and lacks that particularity necessary to show that the goods in question were different from goods acquired and held by a local merchant for local disposition." (317 U. S. at 570, 87 L. ed. at 467). And this observation it may be pointed out obtained where the inquiry was to determine whether the sales by the wholesaler were "in" commerce under the provisions of a statute whose objectives like that of the Sherman Act for purposes of this inquiry was "to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce" (317 U. S. at 567, 87 L. ed. at 465-466). See also, supra, page 7, and *United States v. Frankfort Distilleries*, 324 U. S. 293, 298, 89 L. ed. 951, 956; *United*

States v. Southeastern Underwriters Association, 322 U. S. 533, 558, 559, 88 L. ed. 1440, 1460.

We believe that the allegations of fact in the instant indictment are clearly insufficient to support the contention that the restraint alleged was "in" interstate commerce. As stated by the trial court (R. 23) the indictment

> "* * * does no more than simply allege that these defendants in the State of Washington as wholesalers were ordering, as an ordinary wholesaler does, in anticipation of orders and contracts, and in response to orders and contracts, and that they weren't ordering as agents of Chrysler, but they were buying and selling again, that that is a completed transaction; they bought the goods, and it was shipped in there; they would pass then, I think, from interstate to intrastate commerce, and the succeeding sale would be intrastate commerce."

B. Cases Relied Upon by Appellant.

Reserving for subsequent discussion the question as to whether or not the restraint alleged in this indictment "affects" interstate commerce (infra pp.24-45) we believe that a cursory reading of the cases relied upon by appellant will disclose that they in no wise hold or imply that the restraint here charged is *"in"* interstate commerce.

In *Local 167 v. United States*, 291 U. S. 293, 78 L. ed. 804, the poultry wholesalers took delivery of about half the poultry destined for the New York market at terminals in New Jersey and the balance at terminals in New York City, the loading, unloading and trucking at and from all terminals being handled by members of the defendant union. Recalcitrant wholesalers were "prevented from obtaining poultry by purchase from receivers [commission men], this being accomplished through the aid of the unions, whose members would refuse to load or drive his trucks * * * [and] * * * were

prevented from obtaining poultry at the railroad terminals or the West Washington Market" (*Greater New York Live Poultry C. of C. v. United States,* 47 F. (2d) 156 at 158) (C.C.A. 2, 1941)). In this companion case on the criminal side of the court where the facts were established, the Circuit Court of Appeals observed that the object of the conspiracy "was the prevention of recalcitrant marketmen from obtaining poultry from receivers whether within or without the state of New York, and that the activity of the Truckmen's Union in preventing purchases by such recalcitrants was not merely coincidental but was part of the conspiracy" (47 F. (2d) at 159). Prior litigation indicates that in this industry where the purchases were made by wholesalers at the New Jersey terminals "the poultry reaches Washington Market after a pause at Hoboken only sufficient to put it into crates. It is, moreover, in proof that the sales take place on the same day as the poultry arrives in New York." (*Live Poultry Dealers' Protective Association v. United States,* 4 F. (2d) 840, 842 (C.C.A. 2, 1924)).

It is, we believe, also pointedly significant that the Court in *Local* 167 *v. United States, supra,* specifically did "not decide when interstate commerce ends and that which is intrastate begins" but held (291 U. S. at 297, 78 L. ed. at 808-809):

> "* * * The interference by appellants and others with the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted operate substantially and directly to restrain and burden the untrammelled shipment and movement of the poultry while unquestionably it is in interstate commerce."

And of this holding Chief Justice Hughes wrote in *Apex Hosiery Co. v. Leader,* 310 U. S. 469, 525-526, 84 L. ed. 1311, 1340:

> "Thus it was the 'untrammelled shipment and movement' which, when found to be directly and intentionally restrained was held to constitute violation of the Sherman Act."

To the same effect see *Schechter v. United States*, 295 U. S. 495, 544-545, 79 L. ed. 1570, 1588.

Appellant also relies upon *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518, where the complaint alleged that the various "defendants are engaged in the business of buying live stock at the stock yards in Chicago, Omaha, St. Joseph, Kansas City, East St. Louis and St. Paul and slaughtering such live stock at their respective plants in places named in different states * * *. *The defendants are also engaged in the business of selling such fresh meats, at the several places where they are so prepared to dealers and consumers in divers states and territories * * * and shipping the same meats*" (196 U. S. at 391, 49 L. ed. at 522). The defendants were charged with fixing the prices which they paid for livestock shipped into these various markets and the prices at which they sold the fresh meats. The Court held that commerce among the states "is an object of attack" and considered that the entire activities of defendants constituted "a current of commerce among the states," observing that "the cattle in the stock yard are not at rest even to the extent that was held sufficient to warrant taxation" (196 U. S. at 397, 399, 49 L. ed. at 524, 525).

With reference to *United States v. General Motors Corp.*, 121 F. (2d) 376 (C.C.A. 7, 1941), appellant has itself characterized the case as one involving "another conspiracy *affecting* interstate commerce" (Brief for Appellant, p. 19), and we prefer to discuss the case hereafter in the portion of our brief devoted to that issue.

The final case relied upon by appellant to establish that the indictment here in question alleges a restraint "in" interstate commerce is *Federal Trade Commission v. Pacific States Paper Trade Association,* 273 U. S. 52, 71 L. ed. 534. Here the Court not only found that the price lists of the association were used by the member dealers in making sales to customers outside their respective states but, with respect to the "mill shipments" which the appellant here has referred to, the Court pointed out that there was no sale by a wholesaler to a customer from his stock of merchandise—rather did the customer take actual physical delivery of the goods before they had ever come even temporarily to rest from their interstate movement. The facts related to these transactions are outlined by the Court as follows (273 U. S. at 60, 71 L. ed. at 537):

> "Among the prices fixed by each local association for sales by its members within the state where they are located are prices on what are called 'mill shipments.' These are sales or orders not requiring immediate delivery and capable of being filled by shipment from the place of manufacture. They include less than carload lots and also carload lots. The former are combined with other paper to make a carload which is shipped to the wholesaler as a single consignment. At destination the delivery is taken by the wholesaler and the portion intended for the purchaser is turned over to him. The carload shipments are made on directions specifying as the point of destination the place where delivery is to be made from the wholesaler to the purchaser. In some cases the wholesaler, in other cases the purchaser, is named as consignee. When so named the wholesaler either takes delivery and turns over the shipment to the purchaser or endorses the bill of lading to the purchaser who then receives the paper directly from the carrier. Where named as consignee, the purchaser takes delivery. In all cases the wholesaler orders the paper from the mill and pays for it. There is no contractual relation

between the manufacturer and the purchaser from the wholesaler. These shipments are made from mills within and also from those without the state covered by the agreement fixing prices."

The Court had little difficulty in determining that these sales were "in" interstate commerce stating with reference to these "mill shipments" from one state to another (273 U. S. at 63-64, 71 L. ed. at 538-539):

"* * * For the consummation of a transaction involving such a shipment, two contracts are made. The first is for sale and delivery by wholesaler to retailer in the same state. The seller is free to have delivery made from any source within or without the state. The price charged is that fixed by the local association. The other contract is between the wholesaler and the manufacturer in different states. There is no contractual relation between the manufacturer and retailer. By the shipment of the paper from a mill outside the state to or for the retailer, the wholesaler's part of the first contract is performed. The question is whether the sale by the wholesaler to the retailer in the same state is a part of interstate commerce where, subsequently at the instance of the seller and to perform his part of the contract, the paper is shipped from a mill in another state to or for the retailer. * * * The absence of contractual relation between the manufacturer and retailer does not matter. The sale by the wholesaler to the retailer is the initial step in the business completed by the interstate transportation and delivery of the paper. Presumably the seller has then determined whether his source of supply is a mill within or one without the state. *If the contract of sale provided for shipment to the purchaser from a mill outside the state, then undoubtedly it would be an essential part of commerce among the states. Clearly the absence of such a provision does not affect the substance of the matter when in fact such a shipment was contemplated and made.* The election of the seller to have the shipment made from a mill outside the state

makes the transaction one in commerce among the states. *And on these facts the sale by jobber to retailer is a part of that commerce.*" (Italics supplied)

We believe that a reading of these cases referred to by appellant best demonstrates their inapplicability in any attempt to establish the proposition that intrastate sales by a bona-fide wholesaler are "in" interstate commerce merely because the wholesaler at some undetermined time in advance of such sales may have purchased his merchandise from outside the state. Such, we believe is not the law and for the reasons above indicated we think the *Jacksonville Paper Co.* case, *supra,* is here controlling and dictates that the restraint alleged under the facts set forth in this indictment cannot be held to be "in" interstate commerce.

II. The Indictment Does Not Allege a Restraint "Affecting" Interstate Commerce.

As an alternative basis for sustaining this indictment, appellant urges that it alleges a restraint which "affects" interstate commerce within the meaning of the Sherman Act. (Brief for Appellant, pp. 23-31).

Appellees concur in the position of appellant that purely local activities *may* be subject to federal regulation even though the practices concern intrastate commerce and even though "no part of the product is intended for interstate commerce or intermingled with the subjects thereof." *Wickard v. Filburn,* 317 U. S. 111, 120, 87 L. ed. 122, 132. (Brief for Appellant, p. 23).

Appellees also concur that the test as to whether or not such local activities are subject to federal regulation is stated in *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U. S. 219, 234, 92 L. ed. 1328, 1339, where Justice Rut-

ledge wrote (quoted incorrectly in Brief for Appellant, by omitting words italicized below, pp. 24-25):

> "For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, *the vital question becomes whether* the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence. If so, the restraint must fall . . ."

This test in the application of the federal commerce power to local activities has been enunciated by the Supreme Court on numerous occasions and in connection with the inquiry as to the scope of the commerce clause for varying purposes. With reference to all of such pronouncements and attendant invocation of the federal commerce power, two significant observations may be made.

First, *the relation of these local activities to interstate commerce must be close and the effects of such activities upon interstate commerce must be substantial.* This requirement is stated in varying ways, illustrative of which are the following: "the reach of that power extends to those intrastate activities which *in a substantial way* interefere with or obstruct," *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 119, 86 L. ed. 726, 732 (Agriculture Marketing Agreement Act); "even if appellee's activity be local * * * it may still * * * be reached * * * if it exerts a *substantial economic effect* on interstate commerce," *Wickard v. Filburn*, 317 U. S. 111, 125, 87 L. ed. 122, 135 (Agriculture Adjustment Act); "It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a *close and substantial* relation to interstate commerce," *Santa Cruz Packing Co. v. N.L.R.B.*, 303 U. S. 453, 466, 82 L. ed. 954, 960 (National

Labor Relations Act); "the power * * * extends to the regulation * * * of activities intrastate which have a *substantial effect* on the commerce," *United States v. Darby,* 312 U. S. 100, 119-120, 85 L. ed. 609, 620 (Fair Labor Standards Act); "although activities may be intrastate in character when separately considered, if they have such a *close and substantial relation* to interstate commerce * * * Congress cannot be denied the power * * *" And "intrastate activities, by reason of *close and intimate relation* to interstate commerce, may fall within Federal control." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37, 38, 81 L. ed. 893, 911, 912 (National Labor Relations Act); see also the dissenting opinion of Justice Jackson in *United States v. South-Eastern Underwriters Association,* 322 U. S. 533, 587, 88 L. ed. 1440, 1476.

Secondly, it may be observed that this "substantial effect" is determined upon a factual inquiry into the circumstances presented by each particular case. This is made eloquently plain by the many pages of discussion of the facts presented in the cases above cited as well as the following illustrative comments: "under the Commerce Clause * * * questions of the power of Congress are * * * to be determined by * * * consideration of the *actual effects* of the activity in question upon interstate commerce," *Wickard v. Filburn,* 317 U. S. 111, 120, 87 L. ed. 122, 132; "[Regarding] the doctrine that Congress may provide for regulation of activities not themselves interstate commerce but merely 'affecting' such commerce * * *. In applying this doctrine to particular situations this Court properly has been cautious, and has required *clear findings* before subjecting local business to paramount Federal regulation," Black, J., concurring, *Polish National Alliance v. N.L.R.B.,* 322 U. S. 643, 652, 88 L. ed. 1509, 1517; "These *findings* are not challenged. The threatened consequences to interstate commerce are * * *

*immediate and * * * certain * * *.*" *N.L.R.B. v. Fainblatt,* 306 U. S. 601, 609, 83 L. ed. 1014, 1020; "The statute * * * includes those which unduly cause such restraint *in fact,*" *Industrial Association of San Francisco v. United States,* 268 U. S. 64, 77, 69 L. ed. 849, 853-854; "It is not necessary again to *detail the facts* as to respondent's enterprise * * * it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce * * *." *N.L.R.B. v. Jones & Laughlin Steel Corp.,* 301 U. S. 1, 43, 81 L. ed. 893, 915; and see the above quoted passage from the *Mandeville* decision, supra, p. 25, where it is said that there must be "*a showing of actual or threatened effect* upon interstate commerce."

We believe that the law is clear and unequivocal that local activities (i.e., activities which cannot be held to be "in" interstate commerce) may be subject to federal regulation *if* they have a *substantial effect* upon interstate commerce which effect is shown by the *facts* at hand. In short, the test enunciated in the *Mandeville* decision as quoted above (supra, p. 25) is that of a *substantial factual effect* upon interstate commerce.

This principle had its origins in the "Shreveport doctrine" evolved by the Supreme Court in those cases arising out of the regulation of intrastate railroad rates by the Interstate Commerce Commission. In subsequent years the doctrine has been extended from the transportation field "to general application," and "it was inevitable that the approach would be extended to the productive and industrial phases of the national economy and the statutes regulating them, including the Sherman Act." *Mandeville Island Farms v. American C. S. Company,* note 11, 334 U. S. 219, 232, 92 L. ed. 1328, 1338.

But in applying the Shreveport doctrine in the field of

transportation, as in the cases set forth above which utilize the Shreveport or "affecting" commerce approach in other fields, federal intervention in the area of intrastate transportation has been permitted *only upon a clear factual showing and finding* that the particular intrastate rates unjustly discriminated against and substantially burdened interstate commerce. Without that clear factual basis, federal regulation of intrastate transportation has been proscribed. In the *Minnesota Rate Cases* (*Simpson v. Shepard*), 230 U. S. 352, 57 L. ed. 1511, the Supreme Court was asked to abrogate the entire system of intrastate rates, established by the State of Minnesota, on the theory that the State could no longer exercise state-wide authority over such rates in view of the Interstate Commerce Commission's control over interstate rates. The Supreme Court dismissed the actions on the ground that mere differences between interstate and intrastate rates did not render the intrastate rates invalid *in the absence of a clear factual showing* that those rates had a substantial adverse effect on interstate rates. On the other hand, in the case which first announced the Shreveport doctrine, *Houston E. & W. T. R. Co. v. United States,* 234 U. S. 342, 58 L. ed. 1341, the Supreme Court sustained an Interstate Commerce Commission order requiring that particular intrastate rates be brought into parity with comparable interstate rates where a clear showing was made and embraced in a finding by the Commission that the intrastate rates unjustly discriminated against and burdened interstate commerce.

In its subsequent application, the Shreveport doctrine has been uniformly confined to those instances in which a proper factual showing of unjust discrimination has been made. The principle is still so applied under the Interstate Commerce Act which, as amended, embodies the Shreveport doctrine in statutory form. In the recent case of *North Carolina v. United States,* 325 U. S. 507, 89 L. ed. 1760, the In-

terstate Commerce Commission attempted to strike down intrastate rates upon a showing only that non-uniformity existed between intrastate and interstate rates. The Supreme Court refused to uphold the Commission order in the absence of a clear factual showing of unjust discrimination and emphatically reiterated, in the following language, the rule governing application of the Shreveport doctrine (325 U.S. at 511, 89 L. ed. at 1765):

> "Intrastate transportation is primarily the concern of the state. The power of the Interstate Commerce Commission with reference to such intrastate rates is dominant only so far as necessary to alter rates which injuriously affect interstate transportation. * * * Before the Commission can nullify a state rate, justification for the 'exercise of the federal power must clearly appear'."

A. The Mandeville and Frankfort Distilleries Decisions.

As indicated above, Justice Rutledge in the *Mandeville* decision gave formal expression to the extension of the Shreveport doctrine to the Sherman Act (334 U.S. at 232-235, 92 L. ed. at 1338, 1339, with which compare *F.T.C. v. Bunte Brothers,* 312 U.S. 349, 85 L. ed. 881) although as there recognized numerous opinions of this and other courts had adopted its result in judicial decision. Indeed the decision of this Court as well as the court below in the *Mandeville* case itself [159 F. (2d) 71 (C.C.A. 9, 1947); 64 F. Supp. 265 (S.D. Calif. 1946)] accepted the Shreveport test, this Court observing that "the more accurate expression is 'Substantial economic effect' on interstate commerce" (159 F. (2d) at 72). This Court, however, and the dissenting Justices in the Supreme Court were of the opinion that the amended pleadings "completely eliminated the charge that the agreements complained of affected the price of sugar in interstate commerce" (334 U.S. at 247, 92 L. ed. at 1346).

The *Mandeville* case as expressed in the Supreme Court majority opinion dealt with a "semi-perishable" product (note 2, 334 U.S. at 222, 92 L. ed. at 1333) in an "industry tightly interwoven from sale of the seed through all the intermediate stages to and including interstate sale and distribution of the sugar" (334 U.S. at 239, 92 L. ed. at 1342) and "completely interlocked in all its stages by all-inclusive contract as well as by industrial structure and organization" (334 U.S. at 243, 92 L. ed. at 1344), the "inextricable relationship between the interstate and the intrastate effects" being "shown perhaps most clearly by the provision of the uniform price agreement which ties in the price paid for beets with the price received for sugar" (334 U.S. at 241-242, 92 L. ed. at 1343). The elaborate analysis of facts (334 U.S. at 222-227, 239-244, 92 L. ed. at 1332-1335, 1342-1344) was based upon allegations which were said to be "comprehensive and, for the greater part, specific, concerning both the restraints and their effects" (334 U.S. at 246, 92 L. ed. at 1345) and which disclosed "the industry's unique structure and special mode of operation" (334 U.S. at 225, 92 L. ed. at 1334). Although this decision might well be analyzed as relating only to those activities "in the current of commerce," the Court concluded upon these allegations that "those acts are shown to produce the forbidden effects upon commerce" (334 U.S. at 235, 92 L. ed. at 1340) under the test enunciated above (supra pp. 25-26).

With reference to local price restraints of the nature alleged in the indictment here under consideration, Justice Rutledge laid down what we believe to be the controlling principles governing this appeal. Speaking for the majority of the Court, he wrote (334 U.S. 236-237, 92 L. ed. 1340-1341):

"* * * And a conspiracy with the ultimate object of

> fixing local retail prices is within the Act, if the means adopted for its accomplishment reach beyond the boundaries of one state. * * *
>
> * * *
>
> "Moreover, as we said in the Frankfort Distilleries Case, 'there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states.' 324 U.S. 293, 297, 89 L. ed. 951, 955, 65 S. Ct. 661."

The facts, the language and the holding of the *Frankfort Distilleries* case, 324 U.S. 293, 89 L. ed. 951, related to an intrastate price fixing conspiracy between wholesalers and retailers where "the means adopted for its accomplishment reached beyond the boundaries of Colorado. The combination concerned itself with the type of contract used in making interstate sales; its coercive power was used to compel the producers of alcoholic beverages outside of Colorado to enter into price maintenance contracts" (324 U.S. at 298, 89 L. ed. at 956).

These recent opinions of the Supreme Court in the *Mandeville* and *Frankfort Distilleries* cases clearly indicate that a restraint of so called local or intrastate commerce can only be a violation of the Sherman Act when the "means adopted for its accomplishment reach beyond" interstate boundaries or the conduct is "an inseparable element of a larger program" directed against persons or activity beyond the state lines in question. No such extra-state factors are alleged in the indictment before this Court and we submit that an application of the principles announced in the *Frankfort Distilleries* and *Mandeville* cases dictates the conclusion reached by the trial court—that this indictment must be dismissed. This indictment does not allege a combination by

these defendants with any person outside the State of Washington. This indictment does not allege that any combination or activity of these defendants was directed against any person outside the State of Washington, nor is it alleged that the "means adopted for its accomplishment reach beyond the boundaries" of this state. The course of conduct here alleged is "wholly within" this state and is directed only at the local activity and sales within the State of Washington. The "effect upon interstate commerce" which is "sufficiently substantial" to meet the test suggested in the *Mandeville* case has not been alleged in this indictment. See *C. S. Smith Metropolitan Market v. Food & Grocery Bureaeu of Southern California,* 33 F. Supp. 539 (S.D. Cal., 1939); *United States v. San Francisco Electrical Contractors Association,* 57 F. Supp. 57 (N.D. Cal., 1944); *Ewing-Von Allmen Dairy Co. v. C. and C. Ice Cream Co.,* 109 F. (2d) 898 (C.C.A. 6, 1940), cert. den. 312 U.S. 689, 85 L. ed. 1126.

In this connection we desire to call the Court's attention to the fact that the necessity for establishing the "effect" of any local restraint alleged upon interstate commerce is not obviated by the fact that the restraint alleged is a price fixing agreement. Under the rule of *United States v. Socony Vacuum Oil Co.,* 310 U.S. 150, 84 L. ed. 1129, the allegation of a price fixing agreement characterizes it *per se* as an unreasonable restraint and of the character condemned by the Sherman Act. A price fixing agreement is, in the language of the *Mandeville* decision, *"a restraint of the type forbidden by the Act,"* (334 U.S. at 234, 92 L. ed. at 1328). This is not, however, an allegation of the "effect" on interstate commerce which is of necessity a separate and distinct matter as the decisions in the *Frankfort Distilleries* and *Mandeville* cases plainly demonstrate. As stated in *United States v. Sheffield Farms Co.,* 43 F. Supp. 1, 4 (S.D.N.Y. 1942):

> "Agreements fixing the prices of articles moving in interstate commerce are unlawful per se under the Sherman Act because they eliminate competition. United States v. Trenton Potteries Co., 273 U.S. 392, 47 S. Ct. 377, 71 L. ed. 700, 50 A.L.R. 989; United States v. Socony Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129. Thus, the question to be determined is whether the indictment sufficiently charges a combination or conspiracy affecting interstate commerce."

We challenge the appellant to point out in this indictment any allegations of fact answering "the vital question" posed in the *Mandeville* decision of a "showing of actual or threatened effect upon interstate commerce." (334 U.S. at 234, 92 L. ed. at 1339)

B. Allegations of Conclusions Are Insufficient.

The sole allegation in this indictment which can conceivably be urged to establish "effect" upon interstate commerce is contained in Paragraph 21 (R. 14-15) where it is stated:

> "The purpose, intent and necessary effect of the aforesaid combination and conspiracy has been and is:
>
> * * *
>
> "(c) To directly, substantially and unreasonably burden and restrain the flow in interstate trade and commerce of Chrysler replacement parts and engines. * * *"

That allegation is clearly nothing more than a conclusion of law. The Supreme Court has so characterized a similar allegation in *Newport News Shipbuilding & Dry Dock Co. v. Schauffler,* 303 U.S. 54, 56-7, 82 L. ed. 646, 648. There the complaint alleged "that neither the Company's business nor its relations with its employees affected interstate or foreign commerce." The Court held that the allegation was a con-

clusion of law, not an allegation of fact, and was therefore not admitted by a motion to dismiss. The Court said:

> "The Company insists that since the case was heard on motion to dismiss the bill which alleges that the Company is not engaged in interstate or foreign commerce and its relations to its employees do not affect such commerce, these allegations must be accepted as true. The motion admits as facts allegations describing the manner in which the business is carried on, but not legal conclusions from those facts. The allegations that interstate or foreign commerce is not involved are conclusions of law."

Compare *Foster & Kleiser Co. v. Special Site Sign Co.,* 85 F. (2d) 742, 745, (C.C.A. 9, 1936), cert. den. 299 U.S. 613, 81 L. ed. 452, where this Court observed with reference to allegations under the Sherman Act:

> "The general allegation of interference with interstate commerce is a conclusion of law and is controlled by the specific allegation of facts as to the nature of appellant's business."

In *United States v. French Bauer,* 48 F. Supp. 260 (S.D. Ohio 1942) a Sherman Act indictment precisely similar on this issue to the one here in question was dismissed because of its failure to allege *facts* sufficient to establish that an intrastate price fixing agreement substantially affected interstate commerce. The court said:

> "When the government invokes jurisdiction of the court to determine whether a particular conspiracy or particular acts alleged to constitute a conspiracy are reached by the Sherman Act, I think it clear that facts must be alleged, which, if established by proof, would bring the acts complained of within the scope or reach of the Sherman Act.
>
> * * *

> "My idea of the law is that in view of the authorities which hold that an intrastate conspiracy is not within the Sherman Act unless it directly and substantially affects interstate commerce, it is necessary in an indictment or in a civil pleading seeking relief under the Sherman Act that not merely conclusions but factual allegations be made which are sufficient to show direct and substantial impact upon interstate commerce."

The same view was expressed in *United States v. Greater Kansas City Chapter, National Electrical Contractors Assn., et al,* 82 F. Supp. 147 (W.D. Mo. 1949) where the Court dismissed an indictment under the Sherman Act for the same reason, stating (82 F. Supp. at 148-9):

> "In an indictment it is not sufficient merely to state as a conclusion that the combination or agreement was in restraint of trade but such details must be given as to show in what manner interstate commerce or trade was restrained by the alleged contract, combination or conspiracy."

See also: *Boro Hall Corp. v. General Motors Corp.,* 37 F. Supp. 999 (S.D.N.Y. 1941), affirmed in 124 F. (2d) 822 (C.C.A. 2, 1942) cert. denied 317 U.S. 695, 87 L. ed. 556; *C. S. Smith Metropolitan Market Co. v. Food & Grocery Bureau of So. California,* 33 F. Supp. 539 (S.D.Calif. 1939); *United States v. Morgan,* 10 F. Supp. 382 (E.D. Ill. 1935); *United States v. Kinnebrew Motor Co.,* 8 F. Supp. 535 (W.D. Okla. 1934).

Rule 7(c), Federal Rules of Criminal Procedure, 18 U.S.C.A. following § 687, requires that "the indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Appellees submit that a reading of the indictment here in question best dispels any suggestion that it alleges

"the essential facts" "showing actual or threatened substantial effect upon interstate commerce".

C. Cases Relied Upon by Appellant.

We believe that the cases cited and relied upon by the appellant support and can be understood only in terms of the rationale of the *Mandeville* case as above discussed. In short, those restraints which have been condemned under the Sherman Act have in fact been shown to have a substantial and adverse effect upon interstate commerce.

In *United States v. Women's Sportswear Association,* 336 U.S. 440, 93 L. ed. (adv. op.) 619, the defendant stitching contractors had consummated a restrictive agreement "of the type condemned by the Act" with jobbers who were found to "maintain a current of commerce, substantial in volume and interstate in character" (336 U.S. at 461, 93 L. ed. (adv. op.) at 621). Upon the record established by trial in the court below the Supreme Court concluded that "the business affected by the restraint is interstate commerce" (336 U.S. at 464, 93 L. ed. (adv. op.) at 623). The case is we submit but another application of the well established principle that restraints, otherwise local in character, which are applied to the "current" or "throat" of interstate commerce are subject to the federal commerce power where the effects of such restraints upon interstate commerce are shown to exist. *Swift & Co. v. United States,* 196 U.S. 375, 49 L. ed. 518; *Stafford v. Wallace,* 258 U.S. 495, 66 L. ed. 735; and see *N.L.R.B. v. Fainblatt,* 306 U.S. 601, 83 L. ed. 1014. The decision is not of assistance we believe in considering an intrastate restraint operative after interstate commerce has ended where there are alleged no facts showing a substantial effect upon commerce among the states.

With reference to *Local* 167 *v. United States,* 291 U.S. 293, 78 L. ed. 804, we believe that the discussion of this case above at pp. 19-20 sufficiently indicates a conspiracy where, as stated in the *Mandeville* case, "the means adopted for its accomplishment reach beyond the boundaries of one state" (334 U.S. at 236, 92 L. ed. at 1340); and compare *United States v. Frankfort Distilleries, Inc.,* 324 U.S. 293, 89 L. ed. 951. Also we believe, in the *Local* 167 case, there appears the "substantial economic effect" upon interstate commerce from the facts there disclosed.

So also are the multi-state ramifications of the conspiracy in *United States v. General Motors Corp.,* 121 F. (2d) 376 (C.C.A. 7, 1941) spelled out by the facts discussed in this opinion. The Circuit Court of Appeals opinion states (p. 382-383):

> "In essence the indictment charges that the defendants conspired to restrain unreasonably the interstate trade and commerce in * * * and * * * that their purpose was to control the financing essential to the wholesale purchase and retail sale of General Motors cars; and that in furtherance of this purpose the conspirators devoted themselves to concerted action by which G.M.A.C. financing was imposed on dealers who were engaged in the purchase and sale of the above described cars."

It would be difficult to conceive of a conspiracy more clearly falling within the rule of the *Frankfort Distilleries* case whose "means adopted for its accomplishment reached beyond the boundaries" of a single state (324 U.S. at 298, 89 L. ed. at 956) than is outlined in the indictment and facts set forth in the *General Motors case* (121 F. (2d) at 382-383, 385-397).

Likewise in *United States v. Mountain States Lumber Dealers Ass'n.,* 40 F. Supp. 460 (D. Colo. 1941) cited by

appellant, the multi-state ramifications of the conspiracy involved and the relationship of the local wholesalers to out of state manufacturers appears from the opinion and the companion opinion therein incorporated of *United States v. National Retail Lumber Dealers Ass'n.,* 40 F. Supp. 448 (D. Colo. 1941).

Appellant relies upon and considers as determinative of this case, two decisions of this Court in *Food and Grocery Bureau of Southern California v. United States,* 139 F. (2d) 973 (C.C.A. 9, 1943) and *California Retail Grocers & Merchants Association v. United States,* 139 F. (2d) 978, (C.C.A. 9, 1943) cert. denied 322 U.S. 729, 88 L. ed. 1564. In considering the signifiance of these two decisions we should like to call the Court's attention to the discussion above of the *Frankfort Distilleries* case, supra pp. 31-32, and the following passages from that opinion (324 U.S. at 295, 299, 89 L. ed. at 954, 956):

> " * * * it is alleged that they adopted the following course of action. All of the respondents agreed amongst themselves to (1) discuss, agree upon and adopt arbitrary non-competitive retail prices, markups, and margins of profit; (2) defendant retailers and wholesalers agreed to persuade and compel producers to enter into fair trade contracts on every type and brand of alcoholic beverage shipped into the state, thereby to establish arbitrarily high and non-competitive retail markups and margins of profit, agreed upon by defendants; * * *
>
> * * *
>
> "The fact that the ultimate object of the conspiracy charged was the fixing or maintenance of local retail prices, does not of itself remove it from the scope of the Sherman Act; retail outlets have ordinarily been the object of illegal price maintenance. Whatever was the ultimate object of this conspiracy, the means adopted for its accomplishment reached beyond the

> boundaries of Colorado. The combination concerned itself with the type of contract used in making interstate sales; its coercive power was used to compel the producers of alcoholic beverages outside of Colorado to enter into price maintenance contracts. Nor did the boycott used merely affect local retail business. Local purchasing power was the weapon used to force producers making interstate sales to fix prices against their will. * * * "

In the light of these pronouncements we call attention to the following comments in the two opinions of this Court relied upon by appellant. In the *Food and Grocery Bureau* case this Court observed (139 F. (2d) at 977):

> "The record also portrays clearly the measures pursued by appellants to insure compliance with their distribution and price-fixing policies on the part of manufacturers and distributors * * * including such out-of-state manufacturers and national distributors as * * * the purpose of which was to compel soap manufacturers to cease selling certain types of their products to a certain * * * organization."

and in the *California Retail Grocers* case it is said (139 F. (2d) at 983):

> "Again as in the Southern California case, the conspiracy aimed to fix all minimum retail prices whether of an out-of-state wholesaler making an interstate sale or a retailer selling goods he had imported from out-of-the state or intrastate sales by retailers of goods produced within the state. The purpose of the conspiracy was to 'stabilize' the entire trade in California in all sales, whether interstate or intrastate."

In the light of the observations of the Supreme Court in the *Frankfort Distilleries* and *Mandeville* decisions (supra pp. 29-33) we submit that the attempt of the appellant to apply these cases to the allegations of the indictment here

under consideration is simply without foundation. Appellant states "The fact that in the food cases the attempt was made to enforce the price restrictions upon out-of-state vendors is of no significance" (Brief for Appellant, p. 25). If the decisions of the United States Supreme Court have any meaning it is to teach us that this fact is of paramount significance.

This Court in the food cases did not nor has it varied from the principle that local price restraints are within the Sherman Act *if* a substantial economic effect upon interstate commerce is shown to exist. See *Mandeville Island Farms Inc. v. American Crystal Sugar Co.,* 159 F. (2d) 71 (C.C.A. 9, 1947). Nor did the trial judge vary from this principle when, with reference to the allegations of the indictment in *United States v. Food and Grocery Bureau,* 41 F. Supp. 884, 886 (S.D. Calif. 1941), he wrote:

> "And there are adequate allegations in the indictment to show that, despite the apparent local character of the activities of the defendants, the direct aim, purpose and effect of their acts is the kind of restraint of interstate commerce which these cases denounce. * * * "

In this connection see *C. S. Smith Metropolitan Market Co. v. Food & Grocery Bureau of Southern California, Inc.,* 33 F. Supp. 539, 540 (S.D. Calif. 1939) and compare also *United States v. San Francisco Electrical Contractors Association,* 57 F. Supp. 57, 68 (N.D. Calif. 1944).

Under the rationale of the *Frankfort Distilleries* case, an intrastate transaction can be brought within the Sherman Act only by alleging facts and proving the extra-state operation of the local transaction. As pointed out above, in each of the Sherman Act cases cited by appellant that extra-state operation was clearly alleged and/or proved. Those cases fall squarely within the pattern of the *Frankfort Distilleries* case. On the other hand, those indictments and complaints

which have not alleged facts showing the substantial impact of an intrastate transaction on interstate commerce—i. e. have failed to demonstrate the extra-state operation of the local activity—have uniformly been dismissed as failing to state an offense under the Sherman Act, *United States v. French Bauer,* 48 F. Supp. 260 (S.D. Ohio 1942); *C. S. Smith Metropolitan Market v. Food & Grocery Bureau of So. California,* 33 F. Supp. 539 (S.D. Calif. 1939); *Boro Hall Corp. v. General Motors Corp.,* 37 F. Supp. 999 (S.D.N.Y., 1941) aff'd. 124 F. (2d) 822 (C.C.A. 2, 1942), cert. den. 317 U.S. 695, 87 L. ed. 556; *United States v. San Francisco Electrical Contractors Association,* 57 F. Supp. 57 (N.D. Cal. 1944); *United States v. Greater Kansas City Chapter, National Electrical Contractors Assn.,* et al, 82 F. Supp. 147 (W.D. Mo. 1949); compare *Industrial Association of San Francisco v. United States,* 268 U.S. 64, 83-84, 69 L. ed. 849, 856.

In support of its argument that this indictment alleges a restraint "affecting" interstate commerce, appellant cites and relies upon a number of cases arising under the National Labor Relations Act. Rather than discuss each of these cases in detail we prefer to analyze the premises which we believe underlie all of them.

As indicated above (supra pp. 25-26) the test involved in determining the application of the federal commerce power under the National Labor Relations Act is no different from the test employed with reference to other exertions of the commerce power. *N.L.R.B. v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 37, 38, 81 L. ed. 893, 911, 912; *N.L.R.B. v. Fainblatt,* 306 U.S. 601, 609, 83 L. ed. 1014, 1020; *Santa Cruz Fruit Packing Co. v. N.L.R.B.,* 303 U.S. 453, 466, 82 L. ed. 954, 960. The inquiry in each instance is as to whether or not under the circumstances at hand there is a "substan-

tial economic effect" upon interstate commerce and as observed by Chief Justice Hughes in the *Santa Cruz Packing* case it is plain that the test "cannot be applied by a mere reference to percentages" (303 U.S. at 467, 82 L. ed. 961).

A factual determination of substantial effect "is left to be determined as individual cases arise" (*Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 222, 83 L. ed. 126, 136) but the significant point is that under the National Labor Relations Act "Congress * * * left it to the Board to ascertain whether proscribed practices would in particular situations affect commerce when judged by the full reach of the constitutional power of Congress" (*Polish National Alliance v. N.L.R.B.*, 322 U.S. 643, 648, 88 L. ed. 1509, 1515).

As stated in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 32, 81 L. ed. 893, 908-909):

> " * * * Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to Federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. * * * "

Furthermore it is not the function of the Court in cases arising under the National Labor Relations Act to ascertain whether or not the pleadings allege facts showing a substantial economic effect upon interstate commerce, the role of the court in such cases being limited to the inquiry as to whether or not "the Board's finding that respondents' unfair labor practices have led and tend to lead to labor disputes burdening interstate commerce and interfering with its free flow is supported by the evidence" (*N.L.R.B. v. Fainblatt*, 306 U.S. 601, 608, 83 L. ed. 1014, 1020).

Contrariwise, in situations arising on the pleadings under the Sherman Act, it is for the court itself to ascertain from the facts alleged in the pleadings before it whether there is

shown the necessary substantial economic effect upon interstate commerce, a determination which must be made by the court upon such facts unaided by such "inferences or conclusions" as might be permitted an expert body or administrative agency. Compare *Federal Trade Commission v. Pacific States Paper Trade Association,* 273 U.S. 52, 60-61, 63 L. ed. 534, 537, 538.

It is stated in *United States v. Darby,* 312 U.S. 100, 120, 85 L. ed. 609, 620:

> "In such legislation Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act or whether they come within the statutory definition of the prohibited Act as in the Federal Trade Commission Act. * * * "

Determinations have been made under the National Labor Relations Act that businesses making substantial out of state purchases are not within the coverage of the Act. See, for example, *Bailey Slipper Shop, Inc.,* 84 N.L.R.B. No. 41, Case No. 3-RM-34 (1949) (98% purchased out of state); *Indianapolis Cleaners & Launderers Club,* 85 N.L.R.B. No. 202, Case No. 35-RC-247 (1949); *Fehr Baking Company,* 79 N.L.R.B. 440 (1948); and determinations have also been made that the activities of concerns with insubstantial or no out of state purchases are deemed to be within its terms. *Vulcan Forging Company,* 85 N.L.R.B. No. 114, Case No. 7-C-1769 (1949).

If these labor cases teach anything it is that, as above stated in the *Santa Cruz Packing* case (supra p. 42), the test of "affecting" commerce "cannot be applied by a mere

reference to percentages". Appellant's argument would appear to suggest a mathematical formula by which it could be said that the fact that local concerns make substantial out of state purchases, without more, means that all their activities have a "substantial economic effect" upon interstate commerce. Such we think is not the law nor is it the import of the numerous National Labor Relations Act decisions referred to by the appellant. Compare also *Consoliated Edison Co. v. N.L.R.B.*, 95 F. (2d) 390, 393-394 (C.C.A. 2, 1938), aff'd. 305 U.S. 197, 220, 83 L. ed. 126, 135.

These appellees, it is alleged, make substantial out of state purchases—a situation which is true of every wholesaler and every retailer in America and every other person buying and selling national brand products whether they be Chrysler replacement parts or Wrigley's chewing gum. *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 89 L. ed. 951 holds that this alone is not enough. "A conspiracy with the ultimate object of fixing local retail prices is within the Act, if the means adopted for its accomplishment reach beyond the boundaries of one state." (*Mandeville Island Farms Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236, 92 L. ed. 1328, 1340). It has not as yet been held that mere out-of-state purchases alone constitute means adopted for the accomplishment of a local price fixing conspiracy "which reach beyond the boundaries of one state" and there are we suggest sound reasons of policy why it should not.

If these appellees are to be charged with a restraint which, under the test of the *Mandeville* case, has a "substantial economic effect" upon interstate commerce we submit that the allegations of fact upon which such a charge can be based must be sought elsewhere than in the allega-

tions of this indictment—and such was the conclusion of the court below.

Appellant's brief (p. 31) eloquently pleads:

> " * * * Appellees, dealers in automobile parts and engines manufactured and purchased outside of the state, an essential part of a great national industry, distributors of merchandise utilized throughout the country as the result of a far-flung and mutually dependent system of transportation and distribution, are surely within the reach of federal control under the commerce clause. * * * "

Suffice it to observe that this appeal is not concerned with such rhetorical questions. Should these appellees or any of the thousands of other wholesalers and retailers across the nation engage in a restraint where "the means adopted for its accomplishment reach beyond the boundaries of one state" or where the facts otherwise establish a "substantial economic effect" upon interstate commerce, they or any others upon adequate allegations establishing such facts are within "the reach of federal control under the commerce clause" and the prohibitions of the Sherman Act. Such is not the case presented by the indictment before this Court.

III. Sound Federal Policy Does Not Justify the Extension of the Sherman Act Sought by This Indictment

As indicated above the Supreme Court has not extended the reach of the Sherman Act to local intrastate price fixing combinations where the only relationship to interstate commerce alleged is that the wholesalers or retailers involved purchased goods from outside the state at some undetermined time in advance of their intrastate sales. The decided cases have in each instance condemned those restraints which have been, under the standards outlined above, either

"in" or "substantially affecting" interstate commerce as revealed by the allegations of fact contained in the indictment. Not only have the decided cases failed to intimate that a "substantial economic effect" upon interstate commerce is established by the bare allegation that the local sellers involved have purchased from outside the state but there are sound reasons of policy why they have not. To sustain this indictment we submit is to extend the federal anti-trust laws to every phase of the economic and business life of the 48 states, whose pronouncements of their own public policy, as well as capacity to effectuate them, we think must also be respected by this court. See Washington Constitution, Article 12, Section 22.

As stated by Justice Frankfurter in 10 *East 40th Street Bldg. v. Callus,* 325 U.S. 578, 582, 89 L. ed. 1806, 1812, "We must be alert, therefore not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation."

In *Polish National Alliance v. N.L.R.B.,* 322 U.S. 643, 650, 88 L. ed. 1509, 1516, it is observed:

> "The interpenetrations of modern society have not wiped out state lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single state, but that cannot justify absorption of legislative power by the United States over every activity. * * * "

and it is said in the concurring opinion to this case (322 U.S. at 652, 88 L. ed. at 1517):

> "The doctrine that Congress may provide for regulation of activities not themselves interstate commerce,

> but merely 'affecting' such commerce, rests on the premise that in certain fact situations the Federal government may find that regulation of purely local and intrastate commerce is 'necessary and proper' to prevent injury to interstate commerce. In applying this doctrine to particular situations this Court properly has been cautious, and has required clear findings before subjecting local business to paramount Federal regulation. It has insisted upon 'suitable regard to the principle that whenever the Federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the Federal power must clearly appear'."

See also *N.L.R.B. v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 30, 81 L. ed. 893, 907, where Chief Justice Hughes has stated:

> " * * * The authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several states' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our Federal system."

This balancing of the relationships in our federal system between the rights and obligations of our state and federal governments is by nature a delicate operation and has not as yet been resolved by jurisprudentially divining that the actions of the Congress of 1890 have placed the local retailing and wholesaling activities of the nation under the federal anti-trust laws.

There is likewise a sound policy behind the refusal of the courts to sustain those indictments where the only allegations are mere conclusions that the effect of the restraint

alleged has been "to directly, substantially and unreasonably burden and restrain interstate commerce" (cf. R. 14-15). The foundations of American jurisprudence as grounded in the Fifth Amendment require that the accused be advised of the nature of the charge against him.

If indictments by which prosecutions may be begun are not required to allege specific facts which, if proved, constitute a criminal offense then individuals engaged in transactions and businesses purely local in nature and which are admittedly beyond the federal commerce power stand in constant danger of being brought into court and tried on indictments based upon the general conclusions of the pleader that such local transactions are "in" or "substantially affect" interstate commerce. Such conclusions could in a sense be urged as applying to every local sale and transaction throughout the nation but not as yet have the requirements of criminal pleading been met by the allegation of such conclusions with the result of making every accused stand trial to await the bringing forth of those facts from which courts can determine whether or not the Sherman Act or any other exercise of the federal commerce power may be invoked.

Conceptually there is no local sale or transaction which at some point of its circumference may not be said to touch or affect in some degree the outreaches of the current or stream of interstate commerce. This is far from saying however that under the facts disclosed by the decided cases every local transaction has such "substantial economic effect" upon interstate commerce as to bring it within the scope of the Sherman Act. It may or may not have such effect depending upon the facts. If it does, those facts can and should be made to appear in an indictment based upon such facts.

With justification the courts have been zealous in guard-

ing against the danger of vexatious and unwarranted prosecutions and have been careful that this danger should not be permitted to exist through any failure of the courts to require that in indictments under the Sherman Act as well as other federal statutes there must be a statement of specific facts which are not only sufficient to advise the defendant of the precise nature of the charge he is called upon to meet but also to show on the face of the indictment such facts, which if established, require a judicial finding that the de-defendant has been guilty of some act which is within the scope of federal power and an offense against a federal law.

CONCLUSION

For the reasons and in view of the authorities above set forth, we believe that this indictment does not allege facts showing a restraint either "in" or "substantially affecting" interstate commerce within the Sherman Act and that the judgment of the District Court dismissing the indictment should be sustained.

Respectfully submitted,

BOGLE, BOGLE & GATES
Robert W. Graham
J. Tyler Hull
Attorneys for Appellees Commercial Automotive Service, Inc., Frank L. Hawkins and Carl J. Brush

EGGERMAN, ROSLING & WILLIAMS
Edward L. Rosling
Robert G. Moch
Attorneys for Appellees S. L. Savidge, Inc., W. G. Powell and John Munster

EISENHOWER, HUNTER & RAMSDELL
James V. Ramsdell
Attorneys for Appellees Winthrop Motor Company, George W. Miller and Stanley Peterson

FERGUSON, BURDELL & ARMSTRONG
Charles S. Burdell
Attorneys for Appellees Chrysler Corporation Parts Wholesalers, Northwest Region, and MoPar Club

RANDALL & DANSKIN
C. D. Randall
Attorneys for Appellees Riegel Brothers, Inc., Dee R. Riegel and T. H. Naismith

TRACY GRIFFIN & KENNETH SHORT
Attorneys for Appellees American Automobile Company, Stanley Sayres and Ralph W. Hanson